

MF 01-2

Tax Type: Motor Fuel Use Tax

Issue: Motor Fuel Distributor – 5 Day Revocation

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**ABC, Inc.,
Taxpayer**

No. 99-ST-0000

NTL: 00-000000 0

Account # 0 – 00000

**Charles E. McClellan
Administrative Law Judge**

RECOMMENDATION FOR DECISION

Appearances: Gary Stutland for the Department of Revenue; Warren R. Fuller for ABC, Inc.

Synopsis:

This matter involves a timely filed protest to a Notice of Tax Liability for Motor Fuel Tax (“MFT”) assessed under the Motor Fuel Tax Act (35 ILCS 505/1 *et seq.*, the “ACT”) issued to ABC, Inc. (“taxpayer” or “ABC”) by the Department of Revenue on December 18, 1998. The Notice of Tax Liability related to refunds of MFT paid by the Department pursuant to refund claims filed by Taxpayer. The period involved is December 1, 1995 through July 31, 1998. A pre-trial order was entered in this case on June 14, 2000. This matter also involves a timely protest to a Notice of License Revocation of taxpayer’s motor fuel supplier’s license (Tr. p. 11) issued to taxpayer on

March 10, 2000, which was docketed as No. 00-ST-0000. Case No. 00-ST-0000 was consolidated into this case, No. 00-ST-0000, by order entered on August 16, 2000.

On October 24, 2000, in response to the taxpayer's motion to withdraw its protest to the Notice of License Revocation, an agreed order was entered granting the taxpayer's motion to withdraw its protest to the Notice of License Revocation. The October 24, 2000 order also amended the pre-trial order to reflect that the only issue remaining to be resolved is whether the taxpayer's records support the amount of refund of MFT claimed for off-highway use during the audit period. An evidentiary hearing was held on February 7, 2001 at the start of which the parties filed a stipulation. Both parties also offered oral testimony. I recommend that the Notice of License Revocation and the Notice of Tax Liability be made final.

Findings of Fact:

1. Taxpayer is an Illinois corporation having its principal place of business at 123 Alphabet Lane, Anywhere, Illinois. It operates as a general contractor for highway and heavy construction projects. Stip. ¶ 1.¹
2. Taxpayer has a motor fuel supplier's license issued by the Department of Revenue. Tr. p. 11.
3. For the periods in issue, taxpayer timely filed supplier motor fuel tax returns (Form RFT-5 Motor Fuel Distributor/Supplier Tax Return) on a monthly basis and timely paid the tax shown to be due thereon. Tr. pp. 12-13, 16-18, 32, Stip. ¶ 2, Dept. Group Ex. No. 1, p. 15.

4. Taxpayer reported fuel consumed in highway use on line 14 of Form RFT-5 and fuel consumed in non-highway use on line 15 of the form. Tr. p. 13.
5. During the periods at issue, taxpayer filed monthly claims for refund of the tax it paid on gallons consumed in non-highway (non-taxable) use on the Department's claim form, RMFT 11 Illinois Motor Fuel Tax Refund Claim. Tr. pp. 14, 17.
6. When a taxpayer files a refund claim, the Department pays the refund, as it did in this case, within 60 days to avoid paying interest on the claim. Tr. pp. 25-26.
7. During the periods at issue in this matter, Taxpayer was part of a controlled group of corporations that included the following Illinois subsidiary and affiliated corporations:

XYZ Paving Company ("XYZ")

Rock, Inc. ("Rock")

Smith Club, Inc. ("Smith")

Doe Brothers, Inc. ("Doe") Stip. ¶ 4

8. The members of this controlled group of corporations used off-road construction equipment which may lawfully use high sulfur content dyed diesel fuel. Stip. ¶ 5.
9. Taxpayer fueled the off-road equipment using its tanker truck and third party suppliers. Stip. ¶ 6.
10. Taxpayer employees prepared a Daily Fuel Report which identified the driver, the name and/or number of the construction project, the cost code, the fuel type (high sulfur or low sulfur), the company (whether ABC, XYZ, Doe, etc.), the ticket

¹ References to the stipulation presented at the hearing will be identified by paragraph number (e.g. Stip. ¶

- number for each fueling location or job, the number of gallons for each such filling at the job site, the time of leaving a job site and the time of arrival at the next location. Stip. ¶ 6, Stip. Ex. No. 1.
11. Attached to each daily fuel report are individual pre-numbered fuel tickets. Each fuel ticket identifies the customer order number, the equipment, and the number of gallons, both handwritten and numerically imprinted by the meter on the fuel truck. *Id.*, Stip. Ex. No. 2.
 12. A weekly equipment report is prepared for each company which summarizes equipment costs by job number for jobs in progress during the week. Stip. ¶ 8, Stip. Ex. No. 3.
 13. Taxpayer maintains an equipment journal which allocates equipment costs of each piece of construction equipment and truck on an hourly basis to the various jobs in progress. Stip. ¶ 9, Stip. Ex. No. 4.
 14. A daily cost report is prepared for each job by the assigned superintendent or foreman which shows for that day the costs incurred on the job, the identity of each piece of construction equipment used on the job, the identity of and hours worked by employees, and other factual matter relevant to the job. Stip. ¶ 10, Stip. Ex. No. 5.
 15. The taxpayer maintains a journal showing the vehicles and off-highway equipment units that consumed the fuel involved in this matter. Stip. ¶ 11. Stip. Ex. No. 6.

n). References to exhibits attached to the stipulation will be identified by numbers (e.g. Stip Ex. No. n).

16. The Department commenced the audit involved in this case on October 10, 1997 by sending a letter to the taxpayer's chief financial officer listing the records that should be made available to the Department's auditor and stating that the audit would begin on January 12, 1998. Tr. p. 74, Dept. Group Ex. No. 1, p.21.
17. The audit covered the period beginning December 1, 1995 and ending July 31, 1998. Tr. pp. 14-15, Stip Ex. No. 12.
18. The Department issued its Notice of Liability for Motor Fuel Tax to the taxpayer on December 18, 1998. Dept. Group Ex. No. 1, p.2.
19. The documents for the entire audit period represented by Stip. Exhibits 1 through 6 were made available to the Department's auditor. Tr. pp. 31-32.
20. These documents do not show off-road fuel consumption by off-highway equipment unit. Tr. p. 39, 100; Stip. Ex. No. 12.
21. Taxpayer did not itemize by equipment unit the gallons of motor fuel consumed in highway and off-road usage on its MFT returns. Tr. p. 16.
22. The taxpayer did not produce records for the audit showing the fuel used by each unit off-road in support of its refund claims. Tr. pp. 19, 64; Stip. Ex. No. 12.
23. Taxpayer maintains fuel consumption records by job number, not by equipment unit number. Stip. Ex. No. 12.
24. The taxpayer previously had been advised by the Department of the requirement to maintain fuel usage records by equipment unit. *Id.*

References to the transcript of the hearing will be identified by page number (e.g. Tr. p. n).

25. The Department's auditor could not determine taxpayer's off-highway usage of fuel claimed from the records provided to her. Tr. pp. 27, 39, 47-64; Stip. Ex. No. 12.
26. The Department's auditor determined the amount of motor fuel purchased by the taxpayer by examining purchase invoices. Tr. p. 18.
27. Because the taxpayer did not maintain per unit records of off-highway usage, the Department's auditor began an alternative procedure to audit taxpayer's fuel usage, which began with obtaining the odometer readings of taxpayer's trucks to determine highway usage. Tr. pp. 21-23; Stip. Ex. No. 12.
28. Next, the auditor calculated the gallons consumed in highway usage by dividing the total mileage for the various types of vehicles by estimated mileage rates (i.e., miles per gallon) apropos to the individual truck make and model. *Id.*, Tr. pp. 43-44.
29. The mileage rates used by the auditor were based on average rates found by the Department in auditing other taxpayers that used similar units and by consulting the per gallon mileage standards set by the International Fuel Tax Agreement ("IFTA"). Tr. pp. 23, 43-44; Stip. Ex. No. 12.
30. By dividing the miles the trucks operated during the period by the mileage rates the auditor determined the gallons of fuel consumed in highway usage. *Id.*
31. From these calculations, the Department's auditor determined that the taxpayer understated highway gallon usage on its monthly fuel tax returns, which resulted

in overstatements of off-highway usage on taxpayer's refund claims. Tr. p. 24, Stip. Ex. No. 12.

Conclusions of Law:

The MFT is imposed on motor fuel distributors and suppliers who are required to report purchases, consumption and losses on a monthly basis. 35 ILCS 505/2b. If some of their fuel is consumed in off-highway use, they may file claims for refund which the Department will pay within sixty days to avoid paying interest on the claim. 35 ILCS 505/13, Tr. pp. 25-26.

The Act gives the Department the authority to enact regulations regarding the obligation of taxpayers subject to the Act to keep accurate books and records regarding the purchase and disposition of fuel subject to tax under the Act. 35 ILCS 505/12. The Act also sets forth a claim procedure for a taxpayer to claim a refund for MFT paid for fuel consumed in off-highway use. The Act requires that claims for off-highway use be filed on forms prescribed by the Department. 35 ILCS 505/13.

The Department's regulation prior to January 9, 1998 did not specifically require claimants to maintain records of highway and off-highway fuel usage by unit. However, the regulation did require that claims for refund due to off-highway usage be filed on the claim form prescribed by the Department for that purpose. 86 Admin Code ch. I, § 500.225 (a) as amended at 15 Ill. Reg. 6305, effective April 16, 1991.

The Department's regulation was amended effective January 9, 1998 (22 Ill. Reg. 2253) and amended again April 21, 2000 (24 Ill. Reg. 6918). Both of these revisions set forth the record keeping requirements for motor fuel consumed by distributors, suppliers,

receivers and bulk users. The regulation, as amended effective January 1, 1998, requires that records must include the following information with regard to fuel withdrawn from storage for highway and non-highway usage:

1. Date of withdrawal.
2. Number of gallons by fuel type.
3. Description of vehicle equipment into which the fuel or motor fuel was delivered.
4. **Unit number, license plate number, or vehicle identification number (vin) of the vehicle or equipment.**
5. Detailed description of the purpose for which the fuel or motor fuel was used.

86 Admin Code ch. I, § 500.230(d) as amended at 22 Ill. Reg. 2253, effective January 9, 1998.

These regulations are mandatory, not advisory or suggestive. They have the same status as statutes. Eastman Kodak Co. v. Fair Employment Practices Comm., 86 Ill. 2d 60, 71 (1981) (A properly promulgated administrative regulation is presumed valid and constitutional, and to have the force and effect of law.)

The claim form promulgated by the Department that was in effect at the beginning of the period involved in this case, December 1, 1995, was Form RMFT-11 Illinois Motor Fuel Tax Refund Claim (R-9/95). It required reporting the amount of gallons used by unit on the second page of the form.² Dept. Group Ex. No. 1, pp. 17-20. The instructions issued with this revision specifically explained in Step 7 of the

instructions that a claimant must “List in detail the equipment that used the motor fuel for which this refund claim is being based. Each piece of equipment requires a separate entry. Attach an extra sheet if necessary. . . . Print the motor fuel gallons used by each piece of equipment.” *Id.* Both revisions of the regulations that were in effect during the periods at issue in this matter required claims to be filed on forms prescribed by the Department, and these claim forms required off-highway usage to be reported for each unit of off-highway equipment.

The sole issue to be decided in this matter is whether the evidence submitted by the taxpayer overcomes the Department’s *prima facie* case. The admission into evidence of the records of the Department under the certification of the Director at a hearing before the Department or any legal proceeding establishes the Department’s *prima facie* case. 35 ILCS 120/8, made applicable to the Act by 35 ILCS 505/21; Copilevitz v. Department of Revenue, 41 Ill.2d 154, 242 N.E.2d 205 (1968); Central Furniture Mart v. Johnson, 157 Ill.App. 3d 907 (1st Dist. 1987). Thus, when the Department introduced into the record under the certificate of the director its Form ETS-51 Notice of Tax Liability for Motor Fuel Tax (Dept. Group Ex. No. 1, p. 2) the Department’s *prima facie* case was established.

Once the Department established its *prima facie* case, the burden of proof regarding the gallons of motor fuel consumed in off-highway usage shifted to the taxpayer. Pascal v. Lyons, 15 Ill.2d 41,46; 153 N.E.2d 817, 820 (1958) (The consumer has the burden of proving that the use of the fuel is for a purpose other than motor vehicle

² The prior revision of this form (R-1/91) also required reporting usage on a per unit basis. Stip. Ex. No. 7.

operation on the highways.) In this case, the record establishes that taxpayer did not comply with the Department's published regulations and claim form instructions regarding per unit consumption records and reporting required to substantiate its claim for MFT paid on fuel consumed in off-highway usage. The taxpayer's accountant admitted as much. Tr. pp. 103-104. The evidence shows that the records presented to the auditor during the audit did not permit her to determine off-highway usage. Thus, the evidence establishes that Taxpayer failed to carry its burden of proof.

Taxpayer argues that it should prevail even though its records did not comply with the format required by the Department. Taxpayer maintains that taxpayer kept adequate records and that its claim for refund should not be denied simply because its records are not in the format that the Department is looking for or that would facilitate the performance of the audit. Tr. p. 113. However, the Department is not required to wade through a taxpayer's records to try to reconstruct records the taxpayer was obligated to maintain in the first place. The taxpayer in this case had been advised previously that its records were out of compliance, but it made no effort to bring them into compliance. The statute clearly gives the Department the authority to prescribe regulations and forms for claiming refunds of MFT consumed in off-highway usage. The statutory and regulatory scheme prescribe the method for claiming refunds and the statutory provision and judicial precedents place the burden of proof on the taxpayer to prove its claim.

Taxpayer has failed to keep the required records and to report usage in the mandated format. This failure prevented it from producing sufficient evidence to rebut the Department's *prima facie* case. Therefore, for the reasons set forth above, I

recommend that the Notice of License Revocation and the Notice of Tax Liability for Motor Fuel Tax be made final.

ENTER: March 19, 2001

Administrative Law Judge